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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

PETRA ROCHA CABRERA,

Defendant and Appellant.

2d Crim. No. B235790
(Super. Ct. No. 2011002006)
(Ventura County)

Petra Rocha Cabrera appeals a judgment following conviction of possession of heroin for sale, and transportation of heroin, with a finding that the heroin exceeded one kilogram in weight. (Health & Saf. Code, §§ 11351, 11352, subd. (a), 11370.4, subd. (a)(1).) We modify the judgment to award Cabrera one additional day of conduct credit, but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

In 2009 and 2010, the Drug Enforcement Administration (DEA) conducted an authorized wiretap investigation regarding drug trafficking in Southern California. DEA agents listened to conversations in the Spanish language, originating from telephones subscribed to Cabrera, "Trino" Medina, and "Pancho," among others. On January 29, 2010, a DEA agent overheard Pancho inform Medina that "Petra" would bring him "a blind." Later that day, Medina spoke with "Albino" and directed him to drive to the Denny's restaurant on Oxnard Boulevard and await "a lady" who would

"give [him] something." Medina instructed Albino to "[l]ook around for a lady more or less sitting in a car," and "give her five-hundred (500) dollars." The DEA agent advised local police officers to conduct surveillance near the Oxnard Denny's restaurant.

At approximately 8:30 p.m., Oxnard Police Officer Sheylan Flannery arrived in the Denny's restaurant parking lot. He saw a tan-colored Infiniti automobile occupied by Cabrera and her son, Eduardo Herrera. Cabrera and Herrera immediately left the automobile and approached Flannery. Flannery inquired of their purpose in the parking lot and asked to search their automobile. Herrera turned to Cabrera and said, "He wants to look into the car." Cabrera nodded her head and stated, "It's okay."

Flannery opened the door of the automobile and sensed a "pretty strong" odor of vinegar, similar, in his law enforcement experience, to the odor of tar heroin. Inside the automobile, he saw an open canvas bag containing large plastic bags with smaller plastic bags inside. Each package contained a substance later analyzed and determined to be tar heroin. The total amount of tar heroin weighed 2.276 kilograms or approximately five pounds.

Meanwhile, telephone calls between Medina and Albino continued. Albino informed Medina that he saw "tons of cops," and that they "busted her, right there at Denny's." The prosecutor presented evidence of transcripts of the monitored telephone calls, interpreted in the English language, but he did not play the recordings.

At trial, Cabrera testified and denied being involved in any drug transaction. She also testified that she did not know Medina, Pancho, or "Moy."

Prior Uncharged Crime

In November and December 2009, DEA agents conducted a wiretap surveillance of Cabrera's telephone. On November 21, 2009, a DEA agent overheard a conversation between Cabrera and "Moy," during which Moy instructed Cabrera to give items to another person who would arrive shortly. The agent then advised Downey police officers to monitor Cabrera's residence. Police officers saw a dark-colored Altima automobile parked in Cabrera's driveway. The driver of the Altima left shortly

thereafter and entered a local freeway. The California Highway Patrol conducted a traffic stop of the Altima automobile and discovered 15 pounds of methamphetamine within a large plastic laundry bag lying on the rear seat. The driver later telephoned Cabrera and informed her that he had been stopped by the California Highway Patrol and that his automobile had been impounded.

The jury convicted Cabrera of possession of heroin for sale (count 1), and transportation of heroin (count 2). (Health & Saf. Code, §§ 11351, 11352, subd. (a).) It also found that the weight of the drug exceeded one kilogram. (*Id.*, § 11370.4, subd. (a)(1).) The trial court sentenced Cabrera to eight years in prison, consisting of an upper five-year term for count 2 and a consecutive three-year term for the drug-weight allegation. The court imposed but stayed sentence for count 1 pursuant to Penal Code section 654.¹ The court also imposed a \$400 restitution fine, a \$400 parole revocation restitution fine (stayed), a \$40 court security assessment, a \$30 criminal conviction assessment, a \$50 laboratory fee, and a \$150 drug program fee. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a)(1); Gov. Code, § 70373; Health & Saf. Code, §§ 11372.5, 11372.7, subd. (a).) It awarded Cabrera 789 days of presentence custody credit.

Cabrera appeals and contends that: 1) the trial court erred by admitting evidence of her prior uncharged crime, pursuant to Evidence Code sections 1101, subdivision (b) and 352; 2) the prosecution committed misconduct during summation by implying that she had a burden to produce evidence to establish her innocence; and 3) the trial court erred by awarding her 789 rather than 790 days of presentence custody credit.

DISCUSSION

I.

Cabrera argues that the trial court abused its discretion by admitting evidence of her uncharged crime involving the sale or transportation of 15 pounds of methamphetamine in 2009. She asserts that the prior crime is not sufficiently similar to

¹ All further statutory references are to the Penal Code unless stated otherwise.

establish her intent, knowledge, or common plan. (Evid. Code, § 1101, subd. (b).) Cabrera also claims the evidence was unduly prejudicial pursuant to Evidence Code section 352. She contends that the evidence of her guilt in the present crime is "not particularly strong," and that it is reasonably probable that she would have obtained a better result had the court excluded the uncharged crime evidence.

Evidence Code section 1101, subdivision (b) provides that evidence of uncharged crimes is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. (*People v. Thomas* (2011) 52 Cal.4th 336, 354.) Moreover, the probative value of the uncharged offense evidence must be substantial and not outweighed by the probability that its admission would create a serious danger of undue prejudice, confusing the issues, or misleading the jury. (*Ibid.*) On appeal, we review the trial court's resolution of these issues for an abuse of discretion, i.e., when the ruling falls outside the bounds of reason. (*Id.* at pp. 354-355.)

The least degree of similarity is required to prove intent or mental state; a higher degree is required to prove common plan and the highest degree is required to prove identity. (*People v. Thomas, supra*, 52 Cal.4th 336, 355.) Mental state and intent are rarely susceptible of direct proof and must be proven circumstantially. (*Ibid.*) It has been long recognized that if a person acts similarly in similar situations, he probably harbors the same intent in each instance and that such prior conduct may be circumstantial evidence of his most recent intent. (*People v. Jones* (2012) 54 Cal.4th 1, 50; *Thomas*, at p. 355.)

Evidence of uncharged crimes that are similar to the charged offense may also be relevant to establish that the defendant committed the charged offense pursuant to the same design or plan that he used in committing the uncharged acts. (*People v.*

Kraft (2000) 23 Cal.4th 978, 1031.) Common features must indicate therefore the existence of a plan rather than a series of similar spontaneous acts. (*Ibid.*) The plan need not be distinctive, unusual, or original, however. (*Ibid.*)

The trial court did not abuse its discretion by admitting evidence of the uncharged crime because the evidence was relevant to Cabrera's intent, knowledge, and common plan to sell or transport drugs. In each crime, Cabrera used a cellular telephone to facilitate a drug transaction involving a large quantity of drugs, to arrange payments, and to meet with a person who would accept delivery using a vehicle. Although the nature of the drugs and some details differ, the evidence permits the reasonable inference that if Cabrera harbored an intent to sell drugs in the prior crime, she harbored the same intent in the present case. (*People v. Pijal* (1973) 33 Cal.App.3d 682, 691 [evidence of prior drug crimes admissible to show guilty knowledge, motive, and intent].) The evidence also suggests that she employed a common plan to carry out the crimes. (*People v. Kraft, supra*, 23 Cal.4th 978, 1031 [common plan need not be distinctive, unusual, or original].)

The trial court also did not abuse its discretion by finding that the prior crime evidence was not unduly prejudicial. (Evid. Code, § 352.) The prior crime was not inflammatory, did not involve force or violence, and was committed in a manner similar to the charged offenses. The court also instructed with CALCRIM No. 375, regarding the limited purpose of the prior crime evidence and the prosecutor's burden to prove Cabrera guilty of the charged crimes beyond a reasonable doubt. We presume the jury followed the instruction. (*People v. Myles* (2012) 53 Cal.4th 1181, 1212.)

II.

Cabrera contends that the prosecution committed misconduct during summation by implying that she had a burden to produce evidence of the wiretap recordings to establish that it was not her voice that was recorded. (*People v. Woods* (2006) 146 Cal.App.4th 106, 112 ["[A] prosecutor may not suggest that 'a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her

innocence"].) She argues that the prosecutor improperly shifted the burden of proof by these remarks: "[T]he defense has the same power to introduce So instead of asking you to speculate about the voice on the tapes, the defense could have played them." Cabrera claims the error is aggravated by CALCRIM No. 300, which informed the jury that "[n]either side is required . . . to produce all physical evidence that might be relevant." She asserts the error is of federal and state constitutional dimension because it shifted the burden of proof and denied her due process of law, a fair trial, and a unanimous jury decision. Under any standard of review, Cabrera contends the error is reversible.

The standards governing review of claims of prosecutorial misconduct are well settled. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1275.) "When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls sort of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury." (*People v. Panah* (2005) 35 Cal.4th 395, 462.) To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood that the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Gamache* (2010) 48 Cal.4th 347, 371.)

Although a defendant singles out words and phrases of claimed misconduct, we view the statements in the context of the whole argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) Moreover, we do not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21, superseded by statute as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.)

The prosecutor may comment on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. (*People v.*

Cornwell (2005) 37 Cal.4th 50, 90-91 [fair comment for prosecutor to argue that defendant failed to explain why his vehicle was in close proximity to crime scene], overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Wash* (1993) 6 Cal.4th 215, 262-263 [fair comment for prosecutor to argue that defendant failed to present expert testimony regarding his mental state when he confessed].) "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.)

Cabrera has not established that the prosecutor's comments amount to prosecutorial misconduct. The brief remarks were fair comments responsive to the defense argument that the prosecution did not establish that the voice on the wiretapped recordings was that of Cabrera. The prosecutor did not argue that Cabrera had a duty to produce evidence or a burden to establish her innocence. (*People v. Bradford, supra*, 15 Cal.4th 1229, 1340.) A defendant's constitutional rights are a "shield," not a "sword"; they cannot be used to cut off the prosecution's fair response to the evidence or the argument of defendant. (*People v. Lewis* (2004) 117 Cal.App.4th 246, 257, quoting *United States v. Robinson* (1988) 485 U.S. 25, 32.) In any event, the trial court properly instructed that the jury must follow the instructions as given and that the prosecution must establish guilt beyond a reasonable doubt. (CALCRIM Nos. 200, 220.) We presume the jury understands and follows the trial court's instructions. (*People v. Myles, supra*, 53 Cal.4th 1181, 1212; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1321.)

III.

Cabrera argues that the trial court erred by awarding only 789 rather than 790 days (395 actual days and 395 conduct days) of presentence custody credit according to the law in effect at the time she committed the offenses and when sentenced. (Former § 4019, subd. (f), amended by Stats. 2009, 3d Ex. Sess. 2009-2010,

ch. 28, § 50; former § 2933, subd. (e)(1), amended by Stats. 2010, ch. 426, § 1.) The Attorney General concedes that the court erred by awarding only 394 days of conduct credit.

We modify the judgment to award Cabrera one additional day of conduct credit for a total of 395 days of conduct credit, but otherwise affirm. The trial court shall amend the abstract of judgment accordingly and forward the amended abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Ferdinand D. Innumerable, Judge
Superior Court County of Ventura

Barbara O'Neill Ferris, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M.
Roadarmel, Jr., Supervising Deputy Attorney General, Daniel C. Chang, Deputy
Attorney General, for Plaintiff and Respondent.